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IN THE

Supreme Court of the United States

October Term, 1958

No. 879

ARTHUR FROMEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Arthur Fromen, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 3, 1959, which judgment affirms a judgment of conviction entered against petitioner on March 24, 1958 in the United States District Court for the Western District of New York.

Opinions Below

The judgment of the District Court was entered on the verdict of a jury and the District Court wrote no opinion. The opinions of the Court of Appeals are not officially re-

ported at this time. Copies of the opinions are printed as Appendix A to this petition.

Jurisdiction

The judgment of the Court of Appeals was dated April 3, 1959 and entered on the same day. A copy of the judgment is printed as Appendix B to this petition.

The jurisdiction of the Supreme Court to review the judgment herein by Writ of Certiorari is conferred by Sections 1 and 2 of Article III of the Constitution of the United States; Section 1254(1) of Title 28, U. S. C.; Rule 37(c) of the Federal Rules of Criminal Procedure; and Rule 22(2) of the Rules of the Supreme Court of the United States.

Questions Presented

1. Did the Court err when it charged the jury that it is "not the law" that it is the burden of the Government to "prove every element of the crime alleged beyond every reasonable doubt"?

2. Did the Court err when it charged the jury that the presentment of checks for payment to a bank "knowing that there were insufficient funds in his account, in the drawee's bank to pay such checks", amounted to "false and fraudulent representations to the bank" in view of the undisputed fact that the defendant informed the bank's officer who cashed them at the time he cashed them that the checks were not immediately susceptible of collection?

3. Did the Court err in submitting the first four counts (the mail fraud counts) to the jury in view of the undisputed fact that the defendant told the bank officer the truth about the checks?

4. Did the Court err in submitting counts "FIFTH" through "NINTH" (the aiding and abetting misapplication counts) to the jury in the absence of evidence that the bank officer himself was guilty of such misapplication as a principal?

Statutes and Judgment Involved

The defendant was charged with mail fraud in violation of Section 1341 Title 18 U. S. C. and aiding and abetting an officer of a member bank of the Federal Reserve System to misapply funds of the bank in violation of Sections 656 and 2 Title 18 U. S. C. These sections are printed as Appendix C to this petition.

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed herein is printed as an Appendix B to this petition.

Statement of the Case

We preface our statement of the case with two excerpts from the dissenting opinion of Judge Madden as follows:

> "This is not a case in which the Court is urged to set aside the conviction of an obviously guilty person because of technical errors which might have, but probably did not have, an appreciable effect upon the outcome of the trial. It is a case in which, in my opinion, the trial resulted in the conviction of a man who was shown by the evidence not to be guilty of the crimes for which he was tried and convicted."
>
> • • •
>
> "I think the conviction of the defendant was a gross miscarriage of justice." (Appendix A.)

The Indictment

The indictment contains twelve counts (A 2-12).[1] The first four counts charge mail fraud in connection with a "check kiting" scheme in claimed violation of § 1341, Title 18 U. S. C. Counts "FIFTH" through "NINTH" charge the defendant with aiding and abetting the misapplication of funds by a bank officer in the course of the alleged check kiting scheme in claimed violation of §§ 656 and 2 Title 18 U. S. C. The "TENTH", "ELEVENTH" and "TWELFTH" counts charge the transportation of checks in Interstate Commerce in asserted violation of § 2314 Title 18 U. S. C.[2]

Facts

There was little or no dispute as to the objective facts. The defendant opened an account at the Niagara Falls Branch of the Liberty Bank of Buffalo on October 30, 1956 (R. 7). He opened a special account at the Adam Meldrum and Anderson Branch of the Manufacturers and Traders Trust Company of Buffalo,[3] in Buffalo, N. Y. on November 30, 1956 (R. 55-56).

He was personally known to Edward A. Rick, the manager of the A. M. & A. Branch of the M & T (R. 62-64). The defendant had previously had an account at the A. M. & A. Branch of the M & T (R. 64). The A. M. & A. account was used by the defendant and his wife from time to time to pay household and miscellaneous bills (R. 190-192).

In December of 1956, certain checks drawn by the defendant on his Niagara Falls account and cashed at the

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[1] "A" refers to Appendix to appellant's brief to the Court of Appeals.

[2] These last three counts were dismissed for insufficiency on the motion of the defendant before trial. The SEVENTH count was dismissed at the conclusion of the evidence (R. 571).

[3] Hereafter referred to as A. M. & A. Branch of the M & T.

A. M. & A. Branch of the M & T were returned (A 51, R. 68). The bank manager Edward A. Rick had a conversation with the defendant at that time and called his attention to the returned checks (A 51, R. 174). The defendant stated to Rick that he would make the checks good (A 51, R. 174). Rick testified that "on the basis of that conversation and his (the defendant's) assurance that he would make them good, you (he) continued to hold the checks" (A 51, R. 174).

There then followed a series of transactions whereby the defendant cashed at the A. M. & A. Branch of the M & T checks drawn on his Niagara Falls account, depositing money thus obtained to meet other checks similarly drawn and cashed. The original checks which were the subject of the conversation between the bank officer, Rick, and the defendant were thereafter paid. They are not the checks which have become the subject of any one of the charges contained in the indictment (A 2-14).

Rick testified that he cashed checks which he had been "frankly told were not immediately susceptible of collection" (A 56, R. 182). He said he "held them on the promise of the defendant that he would take care of them" (A 56, R. 182). Rick repeated that the defendant "frankly told you (him) on various occasions that the checks were not immediately collectible" (A 56, R. 182). Rick laconically stated that he "knew the true facts about the checks" at the time he cashed them (A 64, R. 19[illegible]). He summed the matter up by saying that he knew that [illegible] they were cashed, they were no good" (A 7[illegible] R. [illegible]).

The evidence developed in detail the [illegible] checks under the circumstances described at the A. [illegible] A. Branch of the M & T by the defendant, which checks were drawn on his Niagara Falls account. The checks were always presented to the bank manager, Rick. Sometimes the

checks were held for days or weeks before they were put through for collection. The defendant usually covered the checks put through for collection with the proceeds of subsequent checks cashed at the A. M. & A. Branch of the M & T. On occasions, he paid such checks with cash from other sources (A. 67, R. 199).

Late in April of 1957, the aggregate of the uncollected checks cashed by the defendant at the A. M. & A. Branch of the M & T Bank approximated $29,000 (A 67, R. 199). The bank officer Rick testified that the defendant reduced this obligation to the Bank to approximately $17,000. Rick testified that this reduction was accomplished by "putting some of those checks through" (A 67, R. 199). Importantly, he said that the cash to pay these checks "did not come from the Bank" (A 67, R. 199).

In May of 1957, the bank officer Rick had a stroke and went to the hospital (A. 45, R. 165). Before going to the hospital Rick evidently put through for collection a number of checks which he had been holding. These checks reached the defendant's bank at Niagara Falls on Monday, May 13, 1957 (R. 314). The checks aggregated more than the defendant could pay on such short notice and the defendant went to the Niagara Falls bank and stopped payment on the checks (R. 314-315; Ex. 70). Later, charges were placed and an indictment returned.

The defendant broadly claimed upon the trial that the bank officer, Rick, was making informal loans and extending credit to him with full and complete knowledge of the fact that there was not sufficient moneys on deposit in the defendant's account at the Niagara Falls Bank to pay the checks at the times they were cashed.

With respect to the mail fraud counts, the defendant claimed that the undisputed evidence showed that he frank-

ly told the truth and disclosed the facts concerning all of the checks involved in the indictment and in nowise deceived the bank officer Rick who cashed them. Rick, who as we repeat was sworn as a witness by the Government, testified that he was "not deceived" and that he knew the checks were not collectible at the time he cashed them.

With respect to the counts charging misapplication of funds, the defendant claimed that there was no evidence to sustain a finding that the bank officer Rick intended to defraud the bank. The bank officer positively stated that he had no such intention and that "as checks came in and they weren't provided for, I covered them with my own personal funds" (R. 246).

With Respect to Question 1.

The Trial Court erred in charging the jury that it was "*not the law*" that the burden of proof was on the Government to "prove every element of the crimes alleged beyond every reasonable doubt."

All of the counts in the case at bar involve various elements. In summation, we called attention to each of the constituent elements of each of the crimes charged. We argued that various of these elements had not been established by the Government beyond every reasonable doubt. We pitched much of our defense in each instance upon the Government's failure to carry the burden with respect to such elements. When the Court came to charge the jury, it bluntly stated the following:

> "There has been an expression used from time to time that it is the burden of the Government to prove every element of the crime alleged beyond every reasonable doubt. *That is not the law.*" (Italics ours) (A 23)

We excepted to this charge at A 37.

Our research discloses no previous case in the United States, State or Federal, in which a Court told the jury that it was "*not the law*" that the prosecution must establish every element of the crime charged beyond every reasonable doubt before a defendant can be convicted.

The effect of the affirmance of the judgment herein by the United States Court of Appeals for the Second Circuit is to cause conflict with the decisions of other United States Courts of Appeal.

See:

Johnson v. U. S., 244 F. 2(d) 781, 782;
Holland v. U. S., 348 U. S. 191, 99 L. Ed. 150, 75 S. Ct. 127;
Spear v. U. S., 288 Fed. 485, 488;
McAffee v. U. S., 105 F. 2(d) 21, 30;
Williams v. U. S., 131 F. 2(d) 21, 22.

It is respectfully submitted that the Court below in affirming the defendant's conviction has decided a Federal question in conflict with applicable decisions of this Court and has so far departed from the accepted and usual charge on the subject of reasonable doubt as to call for the exercise of this Court's power of supervision.

With Respect to Question 2.

The Court erred in charging the jury just before its retirement that:

> "If you find beyond a reasonable doubt that the defendant presented checks for payment to a bank, knowing that there were insufficient funds in his account, in the drawee bank to pay such checks, such presentment and receipt of cash or other items by the defendant amounts to false and fraudulent representations to the bank, even though certain bank officers knew that the checks were no good and cashed them, and

would amount to fraud as against the bank by the defendant even though he and the officers might have hoped that this enterprise would end successfully."

This charge was clearly error for the reasons assigned by Judge Madden in his dissenting opinion, Appendix A.

The charge left the jury with no alternative to a guilty verdict. All that the jury was called upon to decide under this charge was the question of whether or not the defendant "presented checks for payment to a bank, knowing that there were insufficient funds in his account in the drawee bank to pay such checks." (This fact was not in dispute.) This charge drained out of the case all of the evidence showing that the defendant told the truth with respect to the checks. It removed from the jury's consideration the question of whether or not the bank officer was extending credit by making informal loans and whether the defendant in the circumstances had a right to believe that he was receiving extensions of credit. The charge eliminated from the jury's consideration all question of the defendant's intent and the intent of the bank officer. In short, the charge amounted to a direction of a verdict of guilty. The charge was contrary to the rule of the cases.

The Court had told the jury that "the real question is were the representations made in good faith" (A 25). Later came the Court's statement that the mere presentment of the checks and receipt of cash "amounts to false and fraudulent representations to the bank * * *" (A 34, 35). The Court posed what it called the "real question" and then answered it for the jury once and for all and conclusively against the defendant.

The erroneous charge was not limited in its application to the mail fraud counts but extended at least by plain

implication to the misapplication counts as well. Accordingly, we submit that the error calls for a reversal of the defendant's conviction on all of the counts.

With Respect to Question 3.

The gravamen of the charge made in each of the first four counts of the indictment (the mail fraud counts) is that the defendant "did represent to the Manufacturers and Traders Trust Company that there were sufficient funds in the * * * (Niagara Falls) account to meet and pay the said personal checks".

As Judge Madden pointed out in his dissenting opinion:

> "It is an uncontested fact in the case that the defendant did not make such a representation. It is likewise uncontested that, contrary to making such a representation he had done exactly the opposite, he had advised Rick that the checks were not good." (Appendix A)

In the circumstances, the undisputed evidence established the defendant's innocence and not his guilt.

With Respect to Question 4.

The defendant could not be found guilty of Counts "Fifth" through "Ninth" unless the bank manager, Rick, had been proven guilty of the misapplication of the funds of the bank.

As Judge Madden pointed out in his dissenting opinion:

> "No real effort was made to prove that Rick was guilty of a criminal misapplication of the funds of the bank. He was presented as a witness for the Government; he was questioned at length about the physical acts done by him and by the defendant. He was not asked by the Government about the purposes which caused him to do what he did. It was not intimated, in his examination or otherwise in the evidence, that he

> profited financially or otherwise in the transactions recited. On cross-examination he repeatedly and categorically affirmed that all of his actions were done in the interests of the bank, as he saw those interests. No evidence was introduced by the Government to contradict this testimony of its own witness. Yet the defendant stands sentenced to five years in the penitentiary for aiding and abetting the criminal acts of one as to whom there is no proof of criminal acts."

Here again, the undisputed evidence demonstrates the innocence of the defendant and not his guilt. One of the constituent elements of the crime, *viz-à-viz*, criminal intent on the part of the bank officer was completely lacking. A submission of these misapplication of funds counts to the jury on the basis of a charge which informed the jury that it was "not the law" that the Government must prove "every element of the crime alleged beyond every reasonable doubt" was clearly error, calling for reversal.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

FRANK G. RAICHLE,
Attorney for Petitioner.

RAICHLE, TUCKER AND MOORE,
Of Counsel.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 211—October Term, 1958.

(Argued February 2, 1959 Decided April 3, 1959.)

Docket No. 25285

UNITED STATES OF AMERICA,

Appellee,

v.

ARTHUR FROMEN,

Defendant-Appellant.

Before:

CLARK, *Chief Judge*,

MADDEN, *Judge, United States Court of Claims,** and HINCKS, *Circuit Judge*.

Appeal from the United States District Court for the Western District of New York, Justin C. Morgan, *Judge*.

Arthur Fromen appeals from his conviction of offenses against 18 U. S. C. A. §1341 (which proscribes use of the mails in furtherance of schemes to defraud) and from convictions under 18 U. S. C. A. §2 for aiding and abetting a bank officer in misapplying bank funds in violation of 18 U. S. C. A. §656. *Affirmed.*

* Sitting by designation pursuant to the provisions of 28 U. S. C. § 291(a).

Appendix A.

FRANK G. RAICHLE, of Raichle, Tucker and Moore, Buffalo, N. Y., for defendant-appellant.

LEO J. FALLON, Special Assistant to the U. S. Attorney, Western District of New York, Buffalo, N. Y. (John O. Henderson, U. S. Attorney, and Frederick W. Danforth, Jr., Asst. U. S. Attorney, W. D. N. Y., Buffalo, N. Y., on the brief); for appellee.

HINCKS, *Circuit Judge:*

The defendant was convicted upon an indictment containing four counts involving use of the mails to defraud, in violation of 18 U. S. C. A. §1341, and four counts for aiding and abetting a bank officer in misapplying bank funds in violation of 18 U. S. C. A. §§656 and 2. He was given an aggregate sentence of ten years, five years on the first mail fraud count with concurrent sentences upon the other mail fraud counts; and five years on each of the misapplication counts, the sentences on the misapplication counts running concurrently with each other but consecutively to the mail fraud sentences. From the judgments of conviction, he appeals.

The mail fraud counts alleged, as a part of a scheme to defraud, that the defendant on October 30, 1956 opened a personal checking account under the name of "Edward DeGone" in the Liberty Bank of Buffalo, Niagara Falls Office (hereinafter called the Niagara Bank) and on November 30, 1956 opened a special checking account in his wife's name at the Manufacturers and Traders Trust Company, A. M. & A. Branch (hereinafter called the Buffalo Bank); and that thereafter between March 15, 1957 and May 13, 1957 he cashed or deposited at the Buffalo Bank

checks drawn on the said Niagara account knowing at the time that there were insufficient funds in the Niagara account to pay said checks and that he was without funds to pay said checks when the same would be presented for payment.* These counts further alleged that by depositing in the Niagara account a sufficient portion of the proceeds thus obtained to cover similar checks previously cashed or deposited by the Buffalo Bank, the defendant "did represent to the [Buffalo Bank] that there were sufficient funds in the [Niagara] account to meet and pay" the checks previously drawn; that such representations were false and fraudulent, the Niagara account at all times being insufficient to meet all the checks previously cashed by the Buffalo Bank, and were intended to defraud the Bank to the defendant's profit. Each count alleged a separate mailing. Each of these counts, we hold, sufficiently charged a check "kiting" scheme in violation of 18 U. S. C. A. §1341. *Federman v. United States*, 7 Cir., 36 F. 2d 441, cert. denied 281 U. S. 729; *Henderson v. United States*, 6 Cir., 292 F. 2d 400; *Deschenes v. United States*, 10 Cir., 224 F. 2d 688; *United States v. Feldman*, 2 Cir., 136 F. 2d 394; *United States v. Lowe*, *supra*.

The defendant's contention that there was insufficient evidence to sustain the verdicts on the mail fraud counts, is without merit. There was evidence to show that when the defendant opened his account at the Buffalo Bank on November 30, 1956, through Rick, the manager of the Bank, he was personally indebted to Rick in the amount of $9,500;

* The foregoing allegations, alone, coupled with an adequate allegation covering the statutory requirement of a mailing, sufficiently stated a violation of the mail fraud statute. *United States v. Lyon*, 7 Cir., 115 F. 2d 596, cert. denied 311 U. S. 717. On this appeal no question is raised as to the adequacy of the allegation and proof of the requisite mailings.

that shortly thereafter, in December 1956, Rick, whose authority to make unsecured loans was limited to $2,500, cashed checks drawn by him on the Niagara Bank which were returned for insufficient funds. The aggregate amount of these checks in excess of balances in the defendant's Buffalo account when the checks were returned, was about $11,000. Rick then demanded of the defendant that he make the checks good, saying: "I can't continue to hold them indefinitely." The defendant promised to make the checks good but some two months later the Buffalo Bank held uncollected checks of the defendant to an even greater amount. Thereafter Rick advanced an aggregate of $13,000 of his personal funds to cover the defendant's uncollected checks: as he himself testified, "As checks came in and they weren't provided for I covered them myself with my own personal funds." For some, at least, of the funds so advanced Rick took notes from the defendant (payable to Rick personally) which were never paid. Against this background must be evaluated the subsequent transactions occurring between March 15 and May 13, 1957, as set forth in the mail fraud counts. As shown by undisputed evidence in abundance, the defendant repeatedly obtained from the Buffalo Bank, through Rick on Niagara checks known by Rick to be worthless, cash which he deposited in the Niagara account to cover earlier Niagara checks, for which the Buffalo Bank had given cash or credits and which Rick, in connivance with the defendant, had caused the Bank to hold as "cash items". By this scheme, new checks, also worthless, were substituted for older ones and deposits in the Niagara account of the proceeds of the new checks made it possible for the Buffalo

Bank to collect the older checks in the usual course with a semblance of regularity. The effect was to conceal the earlier fraud and thus to assist the defendant again to pass off his worthless checks in ever larger amounts on the Buffalo Bank.* When at last through the illness of the bank's manager the fraud came to light the Buffalo Bank was left with worthless uncollected checks of the defendant in an aggregate amount of over $60,000.

In this connection, the defendant stresses the alleged absence of evidence to prove that, as charged in these counts, he made false representations to the Buffalo Bank as to the state of his Niagara account. But this criticism is untenable for several reasons. The mere presentation of the Niagara checks to the Buffalo Bank for cash or credit was an implied representation to the Buffalo Bank that there were sufficient funds in the Niagara account to cover them. *United States v. Lowe, supra.* Although one of the Bank officers knew that the representation was false, the representation *to the Bank* was nonetheless false. Moreover, the allegations in the indictment of *misrepresentation* may be treated as surplusage. "A scheme or artifice to defraud" coupled with the requisite mailing, is enough to bring a case within the ban of the statute: without need for resort to misrepresentations such a scheme was alleged and proved here. *Durland v. United States*, 168 U. S. 306; *Gregory v. United States*, 5 Cir., 253 F. 2d 164; *Abbott v. United States*, 5 Cir., 239 F. 2d 310; *Kreuter v. United States*, 5 Cir., 218 F. 2d 532; *Henderson v. United States, supra.*

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* Concealment of fraud in order to perpetrate further frauds may be an integral part of the proscribed scheme. Cf. *Kann v. United States*, 323 U. S. 88, 96, fn. 8.

Appendix A.

We find even less substance to the defendant's assertion that there was insufficient evidence to support the convictions on the charges that the defendant aided and abetted a bank officer in misapplying bank funds in violation of 18 U. S. C. A. §656. It is true, of course, that to convict the defendant of aiding and abetting the bank officer it was necessary to prove all the elements of a federal offense by the bank officer. Here Rick, the bank officer, himself testified that he carried as cash checks of the defendant long after they had been returned uncollected from the Niagara Bank on which they had been drawn and thereafter, while such checks were still unpaid, repeatedly cashed further checks drawn on the defendant's Niagara account; that he requested the defendant to replace "old" unpaid checks with "new" ones; and that to conceal such transactions he made erasures and alterations on the bank records "in case we have an audit" and "to falsify the record."* The

* Rick further testified:

"Q. When you paid out the moneys of the bank against these insufficient fund checks, did you pay it out knowingly and deliberately and intentionally? A. Yes.

* * * * *

"Q. Mr. Rick, when you cashed these last two checks on the 11th [May], did you have any conversation with the defendant at that time? A. Yes.

"Q. What did he say to you and what did you say? A. He said 'I need cash to take down to the bank to cover the previous checks that had been cashed' and that was Saturday afternoon and he said 'I want it now because I have to get down to the Liberty Bank the first thing Monday morning and I won't have time to come up and get the money. I can make it quicker by going from my home.' At that time I said to him—shall I go on?

"Q. Yes, the rest of the conversation. A. I said 'I got to the end of my lane, for the past two weeks I have been sick and can't even write.' I said 'I have been dragging my right leg. It looks as if I am getting a stroke.' He said 'Whatever you do, don't get sick on me.' I said 'I can't take this any longer, the strain and stress is more than I can bear.' He says 'What are you worrying about, you have too thin a skin. If it comes out I will take all the blame.' He says 'I have been in trouble before and I can get the best lawyers to get me out of it,' and that afternoon when I got home I was stricken with a stroke.

* * * * *

(Footnote continued on following page)

evidence of deliberate misapplication by the bank officer as well as participation by the defendant, with criminal intent on the part of both, was ample.

The defendant predicates error on the judge's refusal to grant his requests 13, 39 and 40 which sought instructions that the mail fraud counts and the misapplication counts were so basically inconsistent that convictions on one group precluded convictions on the other group. But this contention rests only on the assumption that the defendant's scheme to obtain cash from the Buffalo Bank

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(Footnote continued from preceding page)

"Q. Will you tell us about this occasion when you went to the Liberty Bank of Niagara Falls with some other person and deposited money over there? A. Yes, there was a check for $1,325.00, which I had cashed for him, and he told me that he needed cash to cover it.

"Q. To cover what? A. To cover the check coming into the Liberty Bank at Niagara Falls, so he came into my office and asked me about it, and I said 'I know that check isn't good, but I will advance you the money to cover it.' He says 'All right, but I haven't time to go down, I have to get back to my office, it is a big gambling day.' He said 'I will send a bell boy from the Hotel Buffalo with my car and you go down with him and see that he deposits it.' I went down with him and went into the parking lot of the Liberty Bank at Niagara Falls, and he went into the bank and deposited the money and brought me back to the office.

* * * * *

"Q. Did you also primarily intend to protect yourself? A. He had me in a satchel. I was trying to get off the best I could.

* * * * *

"Q. Now then it is your present version in May of 1957, Fromen was indebted to you personally for money expended out of your own funds in his behalf? A. Yes.

"Q. And is it your claim that you had a right to reimbursement for those funds? A. I expected to recover some time from him.

"Q. And you had in your possession several of his checks, right? A. None of his checks. I had his notes.

"Q. You had in the physical possession of yourself, as an officer of the bank, several of his checks? A. In the bank records, yes.

"Q. Now how much of your own personal money do you claim you had advanced in behalf of Fromen? A. $13,025.00.

"Q. Are you related to Fromen in any way? A. No.

"Q. He was a customer of the bank in '57? A. Yes.

* * * * *

"Q. Now I show you Government's Exhibits 57 through 60, do not read from them, but I ask you if that refreshes your recollection as to how much money he owed you at that time? A. $9,500.00.

(Footnote continued on following page)

in return for worthless checks drawn on the Niagara Bank was not a scheme to defraud the Buffalo Bank if a Buffalo officer knowingly cooperated with the defendant in the execution of the scheme. In the context of this case, at least, the assumption is without any foundation in law. Since under the defendant's own hypothesis the Bank's officer was colluding with the defendant's fraud, the Bank was not chargeable with the officer's knowledge that the defendant's checks were worthless. *Mutual Life Ins. Co. v.*

(Footnote continued from preceding page)

"Q. When he thereafter cashed checks with you during the month of December, he did, did he not? A. Yes.

"Q. Do you recall whether you had any conversation with him in connection with the amount of money he owed you in the cashing of further checks? A. Yes.

"Q. And when abouts was that? A. I told him he was bleeding me white—

"Q. When was that, in December? A. I can't pin-point the time.

"Q. Was it in that month? A. I think it was.

"Q. Whereabouts did it take place? A. In my office.

"Q. What was that conversation? A. That I had gone as far as I could up to that point, and he would have to bail me out, and he said well, if I went along with him on this check business he would see I got all my money back.

"Q. You mean in connection with cashing more checks for him in December? A. Yes.

"Q. So you then cashed them? A. I kept on in the hopes I would get mine.

"Q. Subsequently some of these checks came back, is that correct? A. Yes.

* * * * * *

"Q. Now there came a time when Fromen came in there one day and said he wanted to borrow a few thousand dollars for the day and you gave him some money, and he paid it back before the day was over? A. He didn't borrow any money but gave me a check and said would take care of it that same day.

"Q. And he did it, didn't he? A. On occasion.

"Q. Whether you call it borrowing or whatever it was he got the money and returned it on the same day, right? A. That is right.

* * * * * *

"Q. When Mr. Fromen came in and obtained a few thousand dollars from you for the day and brought it back at the end of the day, that was the bank's money, wasn't it? A. Yes.

"Q. And he gave you a check for it? A. Yes.

"Q. At the end of the day he redeemed the check? A. Yes.

"Q. And he got $3,000.00 on the faith and credit of the check and his general credit standing with you, isn't that right? A. I wouldn't say his general credit standing with me.

"Q. It was on the faith and credit of the check, then? A. On the check, yes."

Hilton-Green, 241 U. S. 613; *American National Bank v. Miller*, 229 U. S. 521; *In re United States Hair Co.*, 2 Cir., 239 F. 703; *Justheim Petroleum Co. v. Hammond*, 10 Cir., 227 F. 2d 629, 633; 2 C. J. S. Agency §270. We conclude that on the allegations and proofs here there was no inconsistency between the mail fraud and the misapplication counts.

Several claims of error stem from the judge's charge. This contained one passage in which the judge said:

> "There has been an expression used from time to time that it is the burden of the Government to prove every element of the crime alleged beyond every reasonable doubt. That is not the law. It is proof beyond a reasonable doubt and not necessarily to a mathematical certainty. This is no obligation whatsoever upon the defendant to prove his innocence. The presumption of his innocence remains throughout this case unless and until you reach a verdict wherein you find the defendant guilty of the elements of the crime of any or some of the above counts beyond a reasonable doubt."

The defendant would have us lay special emphasis upon the first two sentences of this excerpt. He argues that the jury was confused by the statement, "That is not the law." But it is well settled that the charge must be considered as a whole and thus tested we think it plain that the judge meant to say only that the law does not require proof beyond *every* doubt. That such was the purport of his instruction which was conveyed to the jury is shown by the last three sentences of the above-quoted excerpt. Moreover, elsewhere in the charge the jury had been repeatedly

instructed that guilt must be established beyond a reasonable doubt, and so as to each count. Indeed, the jury was even told that to convict they "must be satisfied beyond a reasonable doubt * * * as to each element of the first four counts * * *." In this, the instructions as to reasonable doubt perhaps went further than is required to protect the defendant. Cf. *United States v. Pape*, 2 Cir., 144 F. 2d 778, cert. denied 323 U. S. 752; *United States v. Spagnuolo*, 2 Cir., 168 F. 2d 768, cert. denied 335 U. S. 824. We conclude that the instructions as to the quantum of proof were free from prejudicial error.

The defendant also complains of the trial judge's refusal to give his requested charge 42.* In this we find no error. For there was no evidence upon which a jury could reasonably find that the defendant, who without contradiction obtained $60,000 of bank funds on his own worthless checks, was without knowledge of this misapplication of funds or that he in good faith believed that the moneys which he received as charged in the misapplication counts upon presentation of his own worthless checks were given him as an authorized bank loan. There was, therefore, no basis in the record for the requested instruction and on that account its refusal was not erroneous. *United States v. Achilli*, 7 Cir., 234 F. 2d 797, 808, cert. denied 352 U. S. 916, vacated 352 U. S. 1023, affirmed 353 U. S. 373, rehearing denied 354 U. S. 943. Moreover, the subject matter of Request 42 was adequately covered, we think, in other pas-

* Request 42 was as follows:
"If you find that the defendant knew of no misapplication of funds by the bank officer and in good faith believed that the bank officer was extending him credit, there can be no conviction of the defendant on the counts charging misapplication of funds by the bank officer."

sages from the charge, some of which we set forth in the margin.*

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* Excerpts from charge as given:

"A mere finding of misapplication of funds of the bank by the bank officer, Rick, at or about the time of the transactions charged against the defendant is not sufficient to justify a conviction of the defendant. You must go further and find that the defendant, with criminal intent aided and abetted such misapplication before you can convict the defendant."

* * * * *

"If the bank officer was in good faith extending credit to the defendant, even though unbeknown to the defendant, he exceeded his authority in so doing, you cannot convict the defendant on any of the counts in this indictment."

* * * * * *

"* * * You must also find fraudulent intent from all the evidence which you believe in this case, that the said [bank officer] intended to wilfully misapply moneys, funds and credits of the bank."

* * * * * *

"* * * As to the other four counts, the aiding and abetting, the essential elements are, first, a fraudulent intent of the defendant * * * to aid * * * in the commission of the acts complained of."

* * * * * *

"Criminal intent on the part of the defendant is a constituent and necessary element of the charge contained in each count of this indictment, and if you have a reasonable doubt as to the existence of a criminal intent on the part of the defendant with respect to any count, you must acquit him as to such count and as to each such count."

* * * * * *

"Misapplication of funds means something more than the maladministration of the affairs of the bank. It means an actual conversion of the funds of the bank by a bank officer with intent to defraud and harm the bank."

* * * * * *

"If you have a reasonable doubt as to whether or not the bank officer, Rick, had an intention to defraud the bank, you must acquit the defendant on the counts charging a misapplication of the funds of the bank."

And subsequent to the main charge the following transpired in the hearing of the jury.

"Mr. Fallon: I would specifically request that charge 10 be read to the jury."

"The Court: Yes, I will so charge."

"If you find beyond a reasonable doubt that the defendant presented checks for payment to a bank, knowing that there were insufficient funds in his account, in the drawee bank to pay such checks, such presentment and receipt of cash or other items by the defendant amounts to false and fraudulent representations to the bank, even though certain bank officers knew that the checks were no good and cashed them, and would amount to fraud as against the bank by the defendant even though he and the officers might have hoped that this enterprise would end successfully."

"Mr. Raichle: Please note me an exception, and I invite your Honor's attention to the fact that the charge given makes no reference to the necessity of criminal intent."

(Footnote continued on following page)

Especially in view of the quoted excerpts, other criticisms of the charge and exceptions to refusals are wholly without substance. The evidence of guilt was overwhelming. Neither in the charge nor elsewhere in the trial record do we find just cause to believe that the trial was lacking in fairness.

Affirmed.

MADDEN, *Judge*, dissenting:

This is not a case in which the Court is urged to set aside the conviction of an obviously guilty person because of technical errors which might have, but probably did not have, an appreciable effect upon the outcome of the trial. It is a case in which, in my opinion, the trial resulted in the conviction of a man who was shown by the evidence not to be guilty of the crimes for which he was tried and convicted.

There is no real disagreement as to the objective facts. Mr. Rick was the manager of the Adam, Meldrum and Anderson Branch of the Manufacturers and Traders Trust Company of Buffalo. He had been an employee of the Adam, Meldrum and Anderson State Bank since 1915 and had been its President from 1943 until it, in March of 1956

(Footnote continued from preceding page)

"The Court: There are several requests of each party that make no reference to the entire case, and I say to you again, that the entire evidence is to be considered and the entire charge is to be considered. These specific requests are in and of themselves excerpts of legal decisions that counsel have asked for and in each case, either for the prosecution or defense, the entire charge is to be considered. I read these specific charges rather than have any question they were not given."

"Mr. Raichle: I ask your Honor to charge the jury that with respect to each count before there can be a finding of guilt or conviction that the jury must find criminal intent on the part of the defendant as you have defined it."

"The Court: I have so charged and I repeat the charge."

became, by merger, a branch of the Trust Company. As president of the bank, before its merger, Mr. Rick had had dealings with the defendant. After the merger, the defendant in November 1956 opened an account with the branch bank, Mr. Rick personally handling the transaction.

In December of 1956 Mr. Rick cashed a number of checks drawn by the defendant on a Niagara Falls bank. The defendant informed Rick at the time Rick cashed these checks that the checks were not good, *i.e.*, that the defendant did not have sufficient funds in the Niagara Falls bank to cover the checks. Rick was, nevertheless, willing to cash the checks and did cash them. This process was repeated many times between December of 1956 and about the middle of May 1957. Some of these checks were sent by mail from the Buffalo bank to the Niagara Falls bank. The first four counts of the indictment of the defendant involved this use of the mail in May of 1957.

These counts of the indictment charged that the defendant

> did represent to the Manufacturers and Traders Trust Company that there were sufficient funds in the * * * (Niagara Falls) account to meet and pay the said personal checks previously drawn, whereas, in truth and in fact, said defendant then and there well knew that there were * * * insufficient funds * * * to pay said checks.

It is an uncontested fact in the case that the defendant did not make such a representation. It is likewise uncontested that, contrary to making such a representation he had done exactly the opposite, he had advised Rick that the checks were not good.

How, then, does one deal with the allegation in the indictment about the false representation? The Government says that although the defendant informed Rick, the only person in the bank with whom he had conversation, that the checks were not good, nevertheless he represented to "the bank" that the checks were good. That would be as if a bank were a disembodied entity, in which no human being was needed to determine to whom the bank should lend its money, for a day or a week or a year. If a private banker, the sole proprietor of a bank, should cash a check on another bank after being advised that it was not presently good, but would be made good at an early date, it would, of course, be impossible to draw the Government's distinction between "the bank" and the banker. The bank and the banker might lose the money, or they might gain the goodwill of an impecunious genius like Henry Ford or Thomas Edison and share the fabulous success of the person so improvidently trusted.

There are indications in the record that the defendant may have been a professional gambler. Why Rick, with forty years' experience as a banker, was willing to trust him, we do not know. That he did trust him, and therefore advanced money to him against his checks, knowing that the checks were not good, is uncontested.

It would be more nearly possible, physically and philosophically, to accept the Government's differentiation between the bank and the banker, and thus find misrepresentation in law where there is none in fact, if the human being listening to the customer, and handing out the bank's money, were acting, not in the interest of the bank, but in aid of the customer's attempt to cheat the bank. Such a

case was *Stevens v. United States*, 227 F. 2d 5 (C. A. 8), in which the defendant induced the cashier of the bank, by tips amounting to $5,000, to join in the defendant's check-kiting scheme. Where the bank's employee connives with the customer to cheat the bank, he shares in the financial spoils, or is rewarded in some other way. In the instant case there is not a whisper of evidence that Rick profited to the extent of one penny, or otherwise, from these dealings which ran into tens of thousands of dollars.

The Government produced Rick as its witness. His testimony, which was uncontradicted and in every respect believable, seemed to me to be the story of a banker who, having made what turned out to be a bad loan to a person of precarious and uncertain income, frequently thereafter has to make the choice as to whether to call the loan and irrevocably precipitate the bank's loss, or lend more money in the hope of keeping the borrower in business and ultimately salvaging the entire debt, with interest. Rick was not the first banker who faced that problem, nor will he be the last. Bankers have won and have lost in such experiences. If they lose too often, they can't go on being bankers. Rick's experience with the defendant included the ups and downs of such a situation. There were times when the defendant got hold of large sums of outside money and used it to reduce his debts to Rick's bank. At one time, some two months before the structure crashed on Rick's head, the defendant had reduced his obligations from $29,000 to $17,000. That, no doubt, gave Rick hope that all might turn out well.

Rick's conduct showed, and his uncontradicted testimony, vouched for by the Government, and confirmed by the cir-

cumstances, that he acted, throughout his dealings with the defendant, for the bank and for no one else. In his position, the defendant as well as any other person dealing with the bank had a right to assume that he had the power to make unsecured loans, permit overdrafts, or give credit by cashing checks on other banks which were not immediately good. If his doing any of these things was in excess of his authority from his principal, the Trust Company, that is no reason why his customer should be sent to the penitentiary. If his doing so violated some law of the State or the Federal Government, which is not asserted by the Government in this case, he, not the customer is answerable for that. If, in order to deceive the auditors and keep alive his hope of collecting this debt, he falsified the bank's records, he, not the customer, is answerable for that.

There is not a breath of evidence in this case that the defendant did not intend to pay back the money that was advanced to him. The evidence shows that in many cases he received money from Rick, the advance being made against the defendant's check, and paid it back the same day, as he had promised. It shows that when he got his hands on outside money, he used it to reduce his debt to Rick's bank. The evidence is completely consistent with the conclusion that he was, like many optimistic borrowers, hopeful that he could take borrowed money and make money with it. His occasional successes fortified his hope. At the crucial time he could not pay his debt. That may have proved that he was reckless and foolish, but one is not sent to the penitentiary for recklessly and foolishly incurring more debts than he can pay.

Appendix A.

The Government is sensitive about the use of the word debt in connection with the defendant's actions, no doubt because the word has no criminal implications. But what, may one ask, is it if not a debt, when one receives money in return for a post-dated check, or for a presently dated check which the one who advances the money is told is not presently good. If not a debt, what is it? Is it a larceny, or an obtaining by false pretense, though there is no false pretense?

The District Judge gave the following instruction to the jury, somewhere about the middle of a long series of instructions:

> If you find that the defendant did not intend to deceive the Manufacturers and Traders Trust Company to whom the checks specified in the mail fraud counts of the indictment were presented for cashing, you must acquit the defendant on such mail fraud counts.
>
> The mere fact that the defendant cashed checks at the Manufacturers and Traders Trust Company which would constitute overdrafts on his account at the Niagara Falls Branch of the Liberty Bank is not sufficient to justify a conviction on any count of the indictment.

After the Court had completed its long charge to the jury, Government counsel specifically requested that his charge to be read to the jury and the Court read it, as follows:

> If you find beyond a reasonable doubt that the defendant presented checks for payment to a bank, knowing that there were insufficient funds in his account, in the drawee bank to pay such checks, such presentment and receipt of cash or other items by the defendant

amounts to false and fraudulent representations to the bank, even though certain bank officers knew that the checks were no good and cashed them, and would amount to fraud as against the bank by the defendant even though he and the officers might have hoped that this enterprise would end successfully.

This instruction, which was adequately excepted to by the defendant, calls for several comments.

1. It is undoubtedly wrong. It simply cannot be true that such a transaction engaged in innocently and in good faith could lay a basis for a criminal prosecution.

2. This instruction, given at the most impressive time in the course of the Court's instructions to the jury, flatly and completely contradicted the Court's earlier instruction, quoted first above, which earlier instruction was unquestionably right. If the giving of instructions by the Court to the jury is anything more than a futile and insignificant solemnity, it surely cannot be tolerated that the Court, impressively and just before the case is given to the jury, erroneously instruct the jury as to the most decisive question in the case, and that the error be treated as cured by thumbing back through the pages of a long series of charges and finding one that is right.

3. The instruction last quoted above was a charge to the jury to find the defendant guilty on the four mail fraud counts. It fitted the uncontested facts of the case with exactness. The defendant had presented these checks knowing they were not good, the principal officer of the bank knew they were not good, and the defendant's position was that he and the bank's officers hoped that the enterprise would turn out successfully.

Appendix A.

When the defendant's counsel excepted to the charge quoted above because, he said, it should have included a statement that "the jury must find criminal intent on the part of the defendant as you have defined it," the Court said laconically, "I have so charged and I repeat the charge." This incorporation by reference of what had been said somewhere else in the Court's long charge to the jury could not have, in effect, withdrawn the specific instruction which he had just given that the mere physical acts which had admittedly been done were, *per se* criminal.

The four counts, fifth through ninth, on which the defendant was convicted, and on which conviction the second five years of his ten year sentence was based, charged the defendant with aiding and abetting the misapplication of funds by a bank officer. It is conceded that, for the defendant to be guilty of this criminal offense of aiding and abetting, Rick must have been proven guilty of the criminal misapplication of the funds of the bank.

No real effort was made to prove that Rick was guilty of a criminal misapplication of the funds of the bank. He was presented as a witness for the Government; he was questioned at length about the physical acts done by him and by the defendant. He was not asked by the Government about the purposes which caused him to do what he did. It was not intimated, in his examination or otherwise in the evidence, that he profited financially or otherwise in the transactions recited. On cross examination he repeatedly and categorically affirmed that all of his actions were done in the interests of the bank, as he saw those interests. No evidence was introduced by the Government to contradict this testimony of its own witness. Yet the de-

fendant stands sentenced to five years in the penitentiary for aiding and abetting the criminal acts of one as to whom there is no proof of criminal acts. In effect the Government says that the criminality of Rick's acts was so obvious that it needed no proof; that its placing Rick on the stand and vouching for his integrity as a witness cannot bind it to the non-existence of a state of facts palpably and undeniably existent. But this palpable and undeniable state of facts would have to be Rick's criminal intention to defraud his bank.

Let us examine into this necessary criminal intention of Rick, without which the defendant's conviction could not stand, which criminal intention is supposed to be so obvious that it stands on its own feet, though contradicted by the testimony of the Government's own witness. Rick had been honorably engaged in the banking business for 40 years. He had been president of the very bank in question for 12 years. When his bank was absorbed by the Trust Company, he was made its manager, its highest executive officer. He was, on account of his age, nearing the end of a long and honorable career, with no breath of suspicion of his integrity. He then, the Government tells us, formed an intention to cheat his bank, though he knew that he was endangering his most prized reward for a lifetime of banking, his unspotted reputation for integrity; though he knew that he was exposing himself to the probability of spending his declining years, not in well earned retirement, but in a State or Federal Penitentiary. And he is supposed to have formed this intention to destroy his reputation and imperil his freedom, for what? *For nothing.* Absolutely and literally, *for nothing at all.*

Appendix A.

In the early stages of Rick's dealings with the defendant, Rick advanced his own personal funds to the bank to cover the defendant's checks. Those advances added up to some $13,000. Yet in all of his later financial dealings with the defendant, including the repayment by the defendant of many thousands of dollars, Rick never repaid himself a penny of these personal advances.

Rick was not prosecuted for the supposed crime to which the defendant was convicted of being an accessory. The prosecuting attorney has discretion as to whom he will prosecute. In the instant case there was, in addition to and above all other reasons, the best of all possible reasons for not prosecuting Rick, *i.e.*, that it was unthinkable that he could have been convicted.

This case was, at best, a difficult one for a jury to analyze intelligently. It involved concepts difficult of apprehension even by a subtle mind. Misrepresentation to the bank accompanied by full and truthful disclosure to the banker; aiding and abetting the commission of a crime which the evidence, common sense and human experience show was not committed; these are concepts which, if within the grasp of anyone, are not within the collective grasp of a lay jury without careful guidance. I think that the verbose, confused and contradictory charge of the Court was of no assistance to the jury. I think the conviction of the defendant was a gross miscarriage of justice.

I would reverse.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House in the City of New York, on the 3rd day of April, 1959.

Present: Hon. Charles E. Clark, *Chief Judge*,
Hon. J. Warren Madden, *Judge, Court of Claims*,
Hon. Carroll C. Hincks, *Circuit Judge*.

—o—

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ARTHUR FROMEN, alias Edward DeGone,
Defendant-Appellee.

—o—

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix C

§ 1341, Title 18 U. S. C.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false and fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

§ 656 Title 18 U. S. C.

"Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Appendix C.

As used in this section, the term 'national bank' is synonymous with 'national banking association'; 'member bank' means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and 'insured bank' includes any bank, banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation."

§ 2 Title 18 U. S. C.

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."